IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1688

LE ROY SYMM, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

On Appeal From The United States District Court For The Southern District Of Texas

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment and injunction of the United States District Court for the Southern District of Texas, entered on March 3, 1978, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinions of the District Court for the Southern District of Texas, Houston Division, are reported in 445

F. Supp. 1245 (1978), 430 F. Supp. 920 (1977) and 422 F. Supp. 917 (1976). Copies of such opinions and the order or judgment accompanying each are included in the separate volume entitled "Rule 15 Appendices to Jurisdictional Statement".

JURISDICTION

This suit was brought under the Fourteenth, Fifteenth and Twenty-Sixth Amendments to the Constitution of the United States, and 42 U.S.C. 1971(a), 1971(c), 1973, 1973j(d), 1973bb, and 28 U.S.C. 2201. The final judgment and injunction of the District Court was entered on March 3, 1978, and notice of appeal was filed in that court on March 27, 1978. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253, and Title 42, United States Code, Section 1973bb.

STATUTES INVOLVED

The 26th Amendment to the United States Constitution, 42 U.S.C., Section 1973bb, and Articles 1.03, 5.01, 5.02, 5.08, 5.09a, 5.10a, 5.17a, 5.18a of the Texas Election Code are not alleged to be invalid, but they are involved in the case, and are therefore included in the separate volume entitled "Rule 15 Appendices to Jurisdictional Statement".

QUESTIONS PRESENTED

(1) Whether, or to what extent, state requirements of residence as a prerequisite to voting should be emasculated by federal courts under the guise of enforcing the 26th Amendment.

(2) Whether the 26th Amendment authorizes a federal court to implement a definition of voting residence different than the definition contained in the Texas Election Code, when the validity of the state definition is not challenged in the suit.

(3) Whether the 26th Amendment authorizes a federal court to supplant the judgmental determination of residence which the Texas Legislature left to the discretion of the individual registrars of voters, when the state statutory provisions are not challenged in the suit.

(4) Whether the appellant has denied voter registration on account of age, or rather, on account of nonresidence.

(5) Whether the District Court correctly distinguished the contrary holdings and final judgments in two prior cases involving the same real parties and the same causes of action.

(6) Whether the District Court correctly decided that the Secretary of the State of Texas has the authority under Texas law to direct any registrar of voters in Texas not to use a questionnaire to determine whether an applicant for voter registration is a resident of the county in which he is attempting to register.

STATEMENT OF THE CASE

This case involves voter registration practices in Waller County, Texas. The same practices and the same Defendant Symm have twice before been the subject of federal court litigation and prevailed. *Wilson v. Symm*, 341 F. Supp. 8 (S. D. Tex. 1972) and *Ballas v. Symm*, 351 F. Supp. 876 (S. D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974) (hereinafter *Wilson* and *Ballas*).

In the present case the United States sued the State of Texas, the Secretary of State of Texas, the Attorney General of Texas, Waller County, Texas, and Le Roy Symm, Tax Assessor-Collector (registrar of voters) of Waller County, Texas, under the Voting Rights Act and the 14th, 15th and 26th Amendments, alleging discrimination on the basis of age and race. While only registration practices within Waller County were complained of, the State of Texas, its Secretary of State and Attorney General, were included as defendants because they allegedly have the authority under the Texas Election Code to stop the registration practices complained of. These three state-level defendants originally answered by denying that they possessed such authority, but subsequently amended their answers to assert such authority and a cross-claim to enjoin Symm from engaging in the subject practices. Symm denied all allegations and by a cross-claim sought a declaratory judgment that the Secretary of State was without authority under the Texas Election Code to direct him or any other registrar of voters in Texas not to use a questionaire to determine whether an applicant for voter registration is a resident of the county in which he is attempting to register.

The conclusions to be drawn from the evidence are of central importance to the appeal. The specific facts will therefore be considered in some detail under the next section of this statement, which deals with the substantiality of the questions presented. We are convinced the evidence shows a conscientious effort by Symm to uniformly implement the meaningful residence requirements of the Texas Election Code, irrespective of the age, student status or race of the applicant for voter registration. If the initial application for voter registration,

personal knowledge, existing registration rolls, or ad valorem tax rolls objectively indicate Waller County residence, the applicant is registered; if not, the applicant is sent a questionaire pertaining to residence. (Copy attached to District Court opinion at 445 F. Supp. 1262). If the completed questionnaire and prior information taken together objectively indicate Waller County residence, the applicant is registered; if not, the applicant is sent notice of the opportunity for a hearing, which can likewise establish Waller County residence and result in registration. If the applicant is rejected after the hearing, he or she is informed in writing of the right to an expedited appeal to state district court, which no rejected applicant has pursued.

The United States claims the Symm practices prevent an indeterminable number of students at Prairie View A & M University from voting in Waller County, while nonstudents similarly situated are supposedly allowed to vote. The practices allegedly discriminate against such students on the basis of age and race, and thereby violate the Voting Rights Act and the 14th, 15th and 26th Amendments. The claims of racial discrimination are based solely on the historical fact that Prairie View A & M has a predominately black student body, and are otherwise without support in the evidence. The lower court recognized this failure of proof and based its decision on the 26th Amendment and the Texas Election Code.

The District Court granted the injunctive relief sought by the United States against Symm, and denied the relief sought against the State of Texas, the Attorney General of Texas, the Secretary of State of Texas, and Waller

County, Texas. The District Court also granted the relief sought by the State of Texas on its cross-claim against Symm, and denied Symm's cross-claim against the State. Symm is the only appellant in this Court. The appellees are the United States, the State of Texas, the Attorney General of Texas and the Secretary of State of Texas.

THE QUESTIONS ARE SUBSTANTIAL

Overview

This is the most recent and most destructive in a series of decisions by lower courts (federal and state—none reviewed by this Court) which have seriously weakened, if not destroyed, any meaningful residence requirement as a prerequisite to voting. The result in these cases is contrary to the philosophy and language of several rather recent opinions by this Court. All of the lower court decisions supposedly implement the 26th Amendment, but the implementation is only indirect at best, while the effect on residence requirements is direct and catastrophic. Most of the decisions, including this one, deal with college students and the difficult question of whether their voting residence is in the college community or elsewhere. The specific connection with the 26th Amendment is rarely discussed by the lower courts and is usually left to the vague assumption that an unknown number of the students are 18-20 years old, which apparently overrides all else, including residence requirements. None of the decisions, including this one, involve denying the right to vote altogether. The only issue is *where* to vote. The answer, according to the lower courts, is in the college community because traveling elsewhere or voting absentee *may* have the *effect* of discouraging an *un-*

determined number of 18, 19 and 20 year olds from voting. This assumed effect should be justified if the applicants are not residents of the college community. The 26th Amendment does not guarantee the vote to non-residents. It is important that a meaningful residence requirement be protected by this Court, and it can be protected without limiting the 26th Amendment.

In the present case, the inescapable and unexaggerated effect of the decision is to judicially determine that anyone who says "I am a resident", is a resident. No further inquiry by the registrar of voters is permitted. This result renders numerous provisions of the Texas Election Code null and void, and the provisions were not even challenged in the suit. The decision is direct federal interference in Texas election procedures, which should be discouraged.

Perhaps the most ironic element of the lower court's decision in this case is the superficial distinctions it draws between the three federal decisions which have dealt with the same Defendant Symm, the same college students, and the same voter registration practices. The two earlier decisions were in favor of Symm and nothing has changed since then. The doctrines of *res judicata* and *stare decisis* should control this case but they did not prevail before the lower court.

The foregoing overview will be discussed in more detail in the remaining sections of this Statement.

A Meaningful Residence Requirement Is Vital to the Electoral Process

In *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965) the Court struck down a provision of the Texas

Constitution which prohibited military personnel from voting in any election in the state so long as such person was in the military. The conclusive presumption of non-residence was considered by the Court to be overbroad and unnecessary in reaching the legitimate end of registering only bona fide residents of the community. The Court repeatedly supported residence as a requirement for voting. "Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. . . . We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation." 380 U.S. at 91-94, 85 S.Ct. at 777-779. The opinion by Mr. Justice Stewart recognized, without criticizing, that residence in Texas has always required a freely exercised intention of remaining within the State and that the declaration of voters concerning their intent to reside in the State and in a particular county is often not conclusive, but is considered with the actual facts and circumstances. It also recognized that particular categories of citizens, such as students at colleges and universities in Texas, "present specialized problems in determining residence". 380 U.S. at 95, 85 S.Ct. at 779. In the concluding paragraph of the majority opinion, the Court pointedly states: "We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence."

Carrington v. Rash was repeatedly cited and approved in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972), which held that durational residence requirements violated the 14th Amendment. The Court did not, however, eliminate bona fide residence as a requirement for voting. "As already noted, a State does have an interest in limiting the franchise to bona fide members of the community." In discussing *Carrington v. Rash*, the Court states: "Since 'more precise tests' were available 'to winnow successfully from the ranks . . . those whose residence within the State is bona fide', conclusive presumptions were impermissible in light of the individual interests affected". 405 U.S. at 351, 92 S.Ct. at 1007. The opinion by Mr. Justice Marshall also refers to "such objective indicia of bona fide residence as a dwelling, car registration, or driver's license." 405 U.S. at 352, 92 S.Ct. at 1008. Symm is using "more precise tests" and "objective indicia of bona fide residence" to winnow nonresidents from the ranks.

In *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973), *cert. denied*, (1974), which the lower court says controls this case, the court *only* invalidated the statutory presumption that students were not residents of their college communities (Texas Election Code art. 5.08(k)). The court did not reverse the presumption or hold that college students were automatically entitled to registration in the county where they lived when attending college. In fact, the opinion states:

> "Texas has unquestioned power to restrict the franchise to bona fide residents. Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). Indeed, such a restriction 'may be neces-

sary to preserve the basic conception of a political community . . ." 482 F.2d at 1232.

It is important to note that *Whatley* is not entirely consistent with *Carrington v. Rash.*

Article 5.02 of the Texas Election Code provides that a person must be a resident of the state, eighteen years of age or older, and have complied with the registration requirements of the code to be a qualified voter. It further provides that "[n]o person may vote in an election held by a county, municipality, or other political subdivision unless he is a resident of the subdivision on the day of the election; and, except, as expressly permitted by some other provision of this code or another statute of this state, no person may vote in an election precinct other than the one in which he resides." Article 5.10a provides that "[a] person is entitled to register as a voter in the precinct in which he has his legal residence (i.e., domicile), as defined in Section 40 of this code (Article 5.08, Vernon's Texas Election Code) . . ." It continues that "no person may vote at any election unless he fulfills all the qualifications of an elector for that election."

Article 5.08 directs that:

> "(a) As used in this code, the word 'residence' means domicile; i.e., one's home and fixed place of habitation to which he intends to return after any temporary absence.
>
> (b) For the purpose of voting, residence shall be determined in accordance with the common law rules as enunciated by the courts of this state and the following statutory rules, but in case of a conflict, the statutory rules shall control.

> (c) A person shall not be considered to have lost his residence by leaving his home to go to another place for temporary purposes only.
>
> (d) A person shall not be considered to have gained a residence in any place to which he has come for temporary purposes only, without the intention of making such place his home."

The remaining subsections (e) through (l) describe residence presumptions for various groups or classes of people, including married men and women and military personnel.

Article 5.09a designates the county tax assessor-collector (Symm) of each county as the registrar of voters in that county. It then provides that "[t]he registrar of voters shall be responsible for the registration of voters . . ."

Article 5.18a relates to change of residence and cancellation or transfer of registration. In this context Subdivision 5(a) provides that "the registrar may utilize any means available to determine whether a registered voter's current legal residence may be other than that indicated as the voter's legal residence on the registration records." Subdivision 6 authorizes the registrar to accept and use forms other than those prescribed by the Secretary of State in making the determination. To say the least, it would be a curious situation to permit the use of a questionnaire in the context of a change of residence but require the much more cumbersome challenge procedure of Article 5.17a in the context of the initial application for registration. Under Article 5.17a any person applying for registration may be challenged by the registrar if the officer taking the application is not

satisfied as to the applicant's entitlement to registration. The article also provides for an expedited appeal to the state district court of the county from a refusal to register. Article 5.17a and 5.18a are in pari materia and should be read together to permit the use of the questionnaire at either stage of the registration process.

The United States does not challenge the foregoing provisions of the Texas Election Code and does not challenge the right to, and need for, bona fide residence as a prerequisite to voting.

Residence is defined in Article 5.08 of the Texas Election Code, which was quoted earlier, and reference is made to the common law for additional clarification. How have the Texas courts construed the term? *Mills v. Bartlett,* 377 S.W.2d 636 (Tex. Sup. 1964) is usually cited when the meaning of the term "residence" is discussed. It was a suit brought by a candidate for the office of County and Criminal District Attorney of Van Zandt County to enjoin the Democratic Executive Committee from placing the name of another candidate for the same position on the ballot. It was alleged that Bartlett (the second candidate) did not meet the residential requirements of the Election Code. The Texas Supreme Court addressed the issues in the following language:

> "The term 'residence' is an elastic one and is extremely difficult to define. The meaning that must be given to it depends upon the circumstances surrounding the person involved and largely depends upon the present intention of the individual. Volition, intention and action are all elements to be considered in determining where a person resides and such elements are equally pertinent in denoting the permanent residence or domicile. Owens v.

> Stovall, Tex. Civ. App. 64 S.W.2d 360, writ refused; Prince v. Inman, Tex. Civ. App., 280 S.W.2d 779, no writ history; In re Garneau, 7 Cir., 127 F. 677, 679.
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> * * * * * *
>
> Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined. There is no specific length of time for the bodily presence to continue." 377 S.W.2d at 637.

Interestingly, Bartlett, the candidate whose residence was challenged, was a law student at Baylor University in Waco, but the court held that his residence was at Canton in Van Zandt County, because when he left there after a one or two day visit, it was for a temporary absence (to complete law school) with a fixed intention to return. The court did not hold and it was not urged that Bartlett ever became a resident of Waco where he attended college.

In *Guerra v. Pena,* 406 S.W.2d 769 (Tex. Civ. App.—San Antonio 1966, no writ), the court quotes the following rule from earlier Texas cases: "A removal to divest one of his right to vote must be accompanied by an intent to make a new domicile and quit the old. Mere removal, coupled with an intent to retain the original domicile and return to it, will not constitute a change." 406 S.W.2d at 776.

In applying this rule, the court held that migrant workers who maintained a permanent residence in a precinct and were gone part of the year because of their work, continued as residents of such precinct. Similarily,

teaching school in another county, or working in a shipyard while waiting for a job in the subject county, or working part of the year in another state on construction jobs, did not change the voting residence of the individuals involved since there was no evidence of an intent to make a new domicile and quit the old. In contrast, evidence of intent to quit the old and make a new domicile was present with respect to a single girl, 27 years of age, who had worked over a year in a factory in Houston, and a divorced man who had worked full-time for a radio shop in Evanston, Illinois, for the last one and one-half years. These two single people only returned on holidays to visit their parents.

The Texas court was searching for the same objective indicia of residence as Symm in this case. The intent to make a place one's home and no plans to move or return elsewhere in the foreseeable future. The objective indicia with regard to the migrant farm workers, school teachers and construction workers showed a temporary absence (whether for six months or four years) because there was no intent to remain at the new place, rather an intent to return to the old. The objective indicia for the two single people showed the opposite intentions. Full-time employment is not usually approached with the idea of changing at a foreseeable point in the future as is college. Obviously, no one can absolutely predict the future or express another's subjective thoughts with complete accuracy. But we can make the best effort possible by considering all of the objective indicia, as well as the statements of the individual, which is exactly what Symm is doing. The objective indicia for many dormitory students at Prairie View A & M show a temporary, educational relocation and no intent to make a new home.

Most people who leave home to go to college consider the move in the limited context of completing an education and have no intention of making their school address their home after the temporary schooling process. It is immaterial whether "temporary" means one day or four years. What is important is no intention of leaving in the foreseeable future—after college.

In *Jordan v. Overstreet*, 352 S.W.2d 296 (Tex. Civ. App.—Beaumont 1961, no writ), the court states that: "Whether a person is a resident of a district or not is distinctly one of intention and of fact. (citing case) Even though he may be temporarily out of the district, if his intention is to return, it is generally held that he is a qualified voter in the district." (citing cases) 352 S.W.2d at 300. Removal for medical attention and recuperation were held not to cause a change of voting residence.

McBride v. Cantu, 143 S.W.2d 126 (Tex. Civ. App.—San Antonio 1940, no writ) repeats the rule that the testimony of a witness as to his intention is not necessarily controlling on the issue of residence, but is an element which may be considered by the authority authorized to determine the fact issues. In *Stratton v. Hall*, 90 S.W.2d 865 (Tex. Civ. App.—El Paso 1936, writ dism'd), the court says: "While declarations of voters are generally admissible to show residence, such declarations are not controlling if the actual facts and circumstances justify a contrary conclusion." (citing cases). 90 S.W.2d at 866.

In the present case, the District Court relied on the activities of other tax assessor-collectors across the State of Texas as evidence of the meaning of residence. 445 F. Supp. at 1257. The comparison between counties only

clouds the true issues in the case. Under the Texas Election Code, Mr. Symm cannot control the other tax assessor-collectors and they cannot control him. The uniform standard in Texas in residence, as defined by the Texas Election Code, and Mr. Symn makes a conscientious effort to implement that standard. 82.85% of the tax assessor-collectors who were deposed by the United States testified that they would not register an applicant as a voter if they knew that his or her good-faith residence was in another county. 84.28% testified that they knew they had a satutory duty to register as voters only those applicants who were good-faith residents of the county. 87.17% knew they had a statutory right to question an applicant concerning his or her good-faith residence, and 88.57% knew they had a statutory right to challenge an applicant who was not a good-faith resident of the county. 87.14% knew that the term "residence" is defined by the Texas Election Code. We are not suggesting that these individuals are trying to violate the law. They are simply not exercising their recognized statutory authority to its fullest extent. A common reason for making no effort to determine residence was lack of manpower and logistical impossibility. Will this Court tell Mr. Symm he can no longer obey the Texas laws simply because no one else does? As with the definition of residence, the United States is suggesting that this Court should redefine the obligations and authority of voter registrars in Texas although the United States has not challenged the present source of their obligations and authority—the Texas Election Code. The effect of the United States' argument is a challenge to the statutory election system in Texas but without pleadings, arguments or evidence as to the validity of the various provisions.

A bona fide residence requirement unintentionally, but inescapably, affects an indeterminable number of students living in the dormitories at Prairie View A & M University because they often have not and could not meet the definition of residence found in the Texas Election Code. This same failure of students to satisfy residency requirements is often found in the context of diversity jurisdiction where "out-of-state students are generally viewed as temporary who are located in the state only for the duration of and for the purpose of their studies." *Lyons v. Salve Regina College,* 422 F. Supp. 1354, 1357 (R.I. 1976). *Accord, Campbell v. Oliva,* 295 F.Supp. 616 (E.D. Tenn. 1968) and *Moss v. National Life and Accident Insurance Co.,* 385 F. Supp. 1291 (W.D. Missouri 1974).

The Waller County (Symm) Registration Process Implements A Meaningful Residence Requirement

The evidence clearly shows that Mr. Symm and his deputies approach every application for voter registration with the question of whether the applicant is a resident of Waller County. (1/31/78 Tr. 18). This question can be answered in any of several ways, each of which is rationally related to determining whether the applicant is in fact a bona fide resident. Some of the indicia of residence are a Waller County native, having family on the registration list, being married with both spouses living in Waller County, personal knowledge or observation of the individual by Mr. Symm or one of his deputies, homestead property on the ad valorem tax roles, automobile on the registration or tax roles. (Tr. 77-79, 84-85). Each of these are objective indicia of the

subjective definition of residence—one's home and fixed place of habitation to which he intends to return after any temporary absence. Without these objective indicia, it would be impossible to implement any meaningful residence requirement—"necessary to preserve the basic conception of a political community" *Dunn v. Blumstein, supra*, 92 S.Ct. at 1004,—because the purely subjective or abstract test of "intention" necessarily could not be applied by anyone except the voter himself, and by him in as many different ways and in reference to as many different places as might suit his convenience at different times. The voter could claim a residence anywhere and the facts would have no bearing upon the matter. *See, Garvey v. Cain*, 197 S.W. 765, 772 (Tex. Civ. App.—Beaumont 1917, no writ). If a person was born in Waller County and is applying to vote there, there is certainly a reasonable indication that he intends to make Waller County his home. If an applicant is married and his spouse also lives in Waller County, there is again a reasonable indication that the couple intend Waller County as their home, and this indication is supported by Article 5.08(f)-(h) of the Texas Election Code. Having family on the registration list is also a reasonable indication of a person's home. It is hard to imagine a better indication of one's home than appearance on the ad valorem tax rolls as a homestead owner. Similarly, automobiles can only be registered in the county of one's residence.

If Mr. Symm or one of his deputies know an applicant through social or business contact, innumerable indicia of residence may be present. For instance, they may be aware that the individual has operated or worked at a local business for years, or has attended the same church

for years, or has lived at the same place for years, and so on. Any one or more of these factors reasonably indicate the home (residence) of the applicant.

In an effort to discredit the foregoing indicia of residence the United States selected 121 registered voters in Waller County for interview by agents of the Federal Bureau of Investigation. The interviewees were selected from Mr. Symm's answers to interrogatories and were people who had been registered as voters without use of the questionnaire or tax rolls. Defendants did not participate in the selection process and had no contact with the interviewees prior to the interviews. (1/31/78 Tr. 87-89). Sixty-six of the interviewees were white (54.55%); forty-nine were black (40.50%), and six were of other race or origin(4.96%). Ten of the interviewees were Prairie View A & M College students at the time they were registered (8.26%), and approximately twenty were eighteen, nineteen or twenty years old at the time of registration. The United States' own reports disprove any claim of racial or age discrimination, or any effort to exclude Prairie View A & M students. These reports and all of the other evidence simply shows that Mr. Symm and his deputies are attempting to the best of their ability to register only residents of Waller County.

The United States asked each of the interviewees "Would Mr. Symm or any deputy know:" (followed by each question on the questionnaire). Obviously, the interviewees could only state whether or not they had personal knowledge about Mr. Symm or any of his deputies, and could only speculate about Mr. Symm's knowledge. Mr. Symm supplied the best evidence of his knowledge at trial through Waller County Exhibit 10, which was an

alphabetical list of the interviewees. Mr. Symm and his deputies placed their initials by the name of each interviewee with whom they were personally acquainted, and about whom they knew all or part of the information inquired into by the questionnaire. (1/31/78 Tr. 89-92, 128). Mr. Symm had previously testified that it was the common practice in the office to discuss an applicant and determine whether anyone in the office had personal knowledge about the person. (Tr. 77-78). Of the 121 interviewees, Mr. Symm and his deputies were personally acquainted with fifty-eight (47.54%). Mr. Symm alone was acquainted with forty-one or 33.61%. (Waller Ex. 10). The United States and the lower court claimed that Mr. Symm or his deputies should have known all of the interviewees, but Waller County Exhibit 11 (the corresponding application of each interviewee) shows that many were registered on some basis other than personal knowledge, such as Waller County native or married.

If an applicant supplies none of the foregoing indicia of residence, Mr. Symm turns to the questionnaire. The questionnaire is not limited to students. (Tr. 85-86). Nine questionnaires sent to nonstudents during 1976 are attached to Mr. Symm's first affidavit. (Waller Ex. 5). This evidence of questionnaires to nonstudents was ignored by the District Court. The United States implied that these were the only questionnaires ever sent to nonstudents, which misinterprets the affidavits and the statements therein. The majority of the questionnaires are sent to students at Prairie View A & M University, not because they are students per se, but because they have not supplied one or more of the initial indicia of residence.

The United States also argued that out of the 545 applicants who were requested to complete the questionnaire

in 1976, only twenty-five were registered without a hearing on the basis of the questionnaire. The United States failed to point out, and the lower court attached no significance to, the fact that 209 of the questionnaires were returned by the post office as "refused" or "unclaimed" and 295 were received but not returned to Mr. Symm's office. (See Waller Ex. 5).

The total information supplied by the questionnaire and application is considered together and no one factor is dispositive or controlling. (Tr. 86, 126). The initial application and the answers to the questions provide a more complete picture from which to determine the residence of the applicant. Again, Mr. Symm and his deputies are searching for objective indicia of the subjective or abstract definition of residence. The subjectivity is on the part of the applicant and is placed there by the Election Code's definition of residence. But in order to implement a meaningful residence requirement, Mr. Symm must search for objective indicia of the subjective intent. Thus, the questionnaire inquires into the present status of the applicant, the duration of his physical presence in the state and county, his statements as to residence, his future plans, ownership of property indicating his home, local memberships and ties with the community, and where he or she lives when not physically present in Waller County. It is hard to imagine a more reasonable method of searching for objective indicia of the subjective intent. The only other alternative is to give complete and controlling weight to the statements of the applicant, without regard to the facts and circumstances. Such an approach is contrary to established Texas law for determining residence and eliminates any meaningful residence requirement. Obviously, many applicants

who state they are residents are in fact residents. But just as obviously, statements as to residence do not establish the home and fixed place of habitation of the individual to which he intends to return after a temporary absence. Virtually none of the applicants would even be aware of the definition of residence, which renders their statements meaningless on the question of whether they fulfill the residency requirement.

Even if the initial application, initial indicia of residence, and questionnaire do not indicate that the applicant is a resident of Waller County, he is not rejected as a voter without first being afforded the opportunity for a hearing. (Tr. 87). A rejected applicant then has the right to appeal to the State District Court, and Mr. Symm so notifies him in writing. No one has ever exercised this avenue of appeal. (Tr. 87).

Both the United States and the lower court expressed justifiable concern about Mr. Symm's statements regarding Article 5.08(k) of the Texas Election Code. We agree that as long as *Whatley v. Clark* is the law, Mr. Symm and his deputies should not presume that students are nonresidents, and we agree that Paragraph 3 of the injunction is proper under the present case law. But an examination of the facts and circumstances clarifies what Symm is actually doing, and there is much more involved than a simple presumption. As with the residency determination itself, controlling weight should not be given to the statements alone. First, there is reasonable and justifiable question in fact whether many of the dormitory students are residents. Historically, many of the dormitory students have not supplied indicia of residence at any stage of the process, and the great majority of them have

not remained in Waller County after graduation since it is a small, predominantly agricultural county with few job opportunities. (Tr. 74-77) Waller County Exhibit No. 9 summarizes the alumni mailing list of Prairie View A & M University. Of 13,038 total alumni, only 473 have mailing addresses in Waller County, which is only 3.63%. 60.89% of those who remained in Waller County are presently registered as voters, which coincides with the usual percentage of registered voters in any population group. These facts raise a justifiable and reasonable question that would exist irrespective of Article 5.08(k). Mr. Symm's testimony (Tr. 81-83, 126-127) and the F.B.I. Reports offered by the United States show that Prairie View A & M students are registered the same as anyone else if they supply the same indicia of residence required of everyone else. The question about their residence does not arise unless the initial indications are missing. (Tr. 83, 127). In fact, the F.B.I. reports show that a larger percentage of Prairie View A & M College students were registered without the questionnaire than actually remain in Waller County after graduation as shown by the alumni mailing list.

It is also interesting to note that the depositions of sixteen key witnesses for the United States (all Prairie View A & M students) show that ten were registered to vote somewhere other than Waller County and at least two others had not applied in Waller County. Sidney Hicks (whose hearsay testimony was relied on heavily by the District Court) testified that he was registered in Navarro County where his parents lived, and he was complaining about the questionnaire rather than a residence requirement. (Prairie View Student Depositions 6-16). Gerard Mosby said he was a resident of *both*

Travis and Waller Counties and sent applications to both. (28-38). Sheila Davis was also complaining about the use of the questionnaire. (50). William Dawn testified "I am a resident of Dallas County." (79). Leon Kirk said his "address at home" was Fort Worth. (172).

From the foregoing it is obvious that Article 5.08(k) simply articulated a question in fact which does not arise, however, unless other indicia of residence are missing. It is also apparent that what we are talking about in this case is the meaning of "residence" in Texas and not whether applicants are black or white, or 18 years vs. 65 years of age.

The Lower Court Is Implementing A Definition Of Residence Different Than The Definition In The Texas Election Code And The State Definition Is Not Challenged In The Suit

The injunction of the District Court provides, among other things, that:

"1. College students of Waller County shall be registered and allowed to vote on the same basis and by application of the same standards and procedures as non-students, without reference to whether such students have dormitory addresses, whether or not they resided in Waller County prior to attending school, and whether or not they plan to leave Waller County upon graduation.

2. The Court recognizes that Leroy Symm has the right under the Texas Election Code to make a factual determination as to whether or not each applicant to vote is a bona fide resident of Waller

County; however, in making this factual determination, Leroy Symm shall not find that a person is a non-resident of Waller County for any of the following reasons:

A. That such person resides in a dormitory at Prairie View A&M University;

B. That such person owns no property in Waller County;

C. That such person is a student at Prairie View University;

D. That such applicant has no employment or promise of employment in Waller County;

E. That such applicant previously lived outside Waller County, or may live outside Waller County after his graduation;

F. That such person visits the home of his parents, or some other place during holidays and school vacations."

* * *

"4. The Tax Assessor, Leroy Symm, shall immediately cease the utilization of the residence standard for students which has been implemented by means of a questionnaire, shall terminate the use of the questionnaire, and shall henceforth register students on the basis of the information contained in the state-approved registration form. as is done elsewhere in Texas, unless Leroy Symm has tangible, recordable evidence (consistent with Paragraph 2 above of this injunctive decree) that such applicant is not a bona fide resident of Waller County. Defendant is enjoined from subjecting Prairie View students to any particular or discriminatory procedure not applied to non-students on a regular basis, such as for example, causing students to visit his

> office and submit students orally to the questioning previously contained in the questionnaire discussed in this Court's Memorandum Opinion."

The inescapable effect of the foregoing provisions is to define residence for voting registration purposes and abrogate Symm's statutory authority and obligations. But the lower court's definition by exceptions does not implement the current definition of residence found in the Texas Election Code—one's home and fixed place of habitation to which he intends to return after a temporary absence. An applicant for voter registration can simply state "[I] am a resident" and will be entitled to registration even though the applicant has no idea of the meaning of residence, and has no idea whether he in fact satisfies the criteria of residence. His statement on residence would, in most cases, be made in good faith, but would still be meaningless since everyone's definition of residence would differ. Any meaningful residence requirement is thereby destroyed. Absolutely nothing in the district court's definition of residence objectively indicates the home and fixed place of habitation of the individual to which he intends to return after a temporary absence. It is impossible to accept this definition and continue to define residence as one's home and fixed place of habitation to which he intends to return after a temporary absence. The United States and the lower court disclaimed any effort to define voting residence for the State of Texas. But that is exactly what the opinion and judgment accomplish.

The United States asked and the lower court held that students in Waller County not be subjected to the presumption contained in 5.08(k) of the Texas Election

Code, or to any other presumption with regard to their voting residence. We agree that as long as *Whatley v. Clark* is the law, students should not be presumed nonresidents simply because they are students. But there is no authority to reverse the presumption or hold that students are automatically entitled to registration without satisfying bona fide residence requirements. Elimination of a presumption of student nonresidence will not eliminate the question in fact regarding the residence of those applicants who do not supply some objective indicia of residence.

The United States and the District Court are in effect saying that identical indicia of residence should be applied to every applicant for voter registration—simply submit an application and you are a resident. But by definition, residence is a subjective and abstract state of mind which can only be indicated by all of the facts and circumstances, including the statements of the applicants. If the meaning of residence is relegated to a mechanical formula, it will necessarily preclude an accurate determination as to one's home and fixed place of habitation to which he intends to return after a temporary absence. The entire purpose for having a residence requirement is thereby frustrated.

It is important to remember that the United States has not challenged, and the lower court has not expressly invalidated, any provision of the Texas Election Code, whether it be the definition of residence or the authority of state and county officials. The missing link in this case is any challenge to the Texas Election Code. The United States in effect asked that some of its provisions be substantially altered or destroyed without even raising

the issue of their validity—and that is what the District Court did. It is patently obvious that the United States and the lower court focused on Mr. Symm and want him to stop using the questionnaire and accept the State voter application form only. The United States and the District Court are effectively urging that the statement of the applicant control residence, though residence as defined in the Texas Election Code depends upon all the facts and circumstances. Considering the doctrines of federalism and comity, this Court should not permit the United States to alter the definition of residence in Texas without an express challenge to the validity of the provisions of the Texas Election Code.

The Other Decisions Which Have Emasculated Residence Requirements

The United States and the lower court relied on cases which are not only distinguishable on the facts, but more importantly, totally ignore State requirements of residence as a prerequisite to voting and the emasculation of such requirements under the guise of enforcing the Twenty-Sixth Amendment.

In *Frazier v. Callicutt*, 383 F.Supp. 15 (N.D. Mass. 1974), on the merits of the case, the court carefully distinguished and approved *Ballas v. Symm, supra*, with the following language:

> "The facts in the Ballas case must be carefully distinguished from those in the case at bar. In Ballas, the additional burden of completion of a questionnaire was imposed upon some prospective voters by the registrar, but this disparate treatment was justified as it was imposed in an impartial manner only upon those applicants for whom there existed

> no alternative channel for securing information as to residency. In the case sub judice, the burden of completing the questionnaire was imposed upon all applicants, but the registrar imposed an additional burden of prosecuting an appeal to the board of election commissioners on some applicants by summarily disapproving the applications of anyone claiming to reside on the campus of Rust or Mississippi Industrial College. This arbitrary distinction alone would perhaps be sufficient to establish the existence of a different standard, but such a finding is conclusively buttressed by the failure of the registrar to refer the applications of members of the 'favored' class, non-students, in accordance with Mississippi law." 383 F.Supp. at 20.

Mr. Symm does not summarily reject college students.

Sloane v. Smith, 351 F.Supp. 1299 (M.D. Pa. 1972) presented an entirely different factual situation from the case at bar. The County Board of Elections summarily rejected the voter registration applications of students. Mr. Symm looks for the same objective indicia of residence for students and non-students. Even with the entirely different fact situation, the *Sloane* court agreed that "[a] State has the power to require that voters be bona fide residents of the relevant political subdivisions and an appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. [citing *Dunn v. Blumstein* and *Carrington v. Rash, supra*]." *Id.* at 1303.

Ownby v. Dies, 337 F.Supp. 38 (E.D. Tex. 1971) was a consent judgment involving a residency presumption of the Texas Election Code (Art. 5.08), which has since

been repealed. It has as little application to this case as *Whatley v. Clark, supra* should have. Neither case reverses the presumption or holds that a student is automatically a resident for voting purposes of the county where he attends college.

Bright v. Baesler, 336 F.Supp. 527 (E.D. Ky. 1971) involved a discriminatory misapplication of residency statutes by local officials. This same showing cannot be made in the present case. Mr. Symm will register student or non-student applicants if indicia of residence are present. As far as the 26th Amendment is concerned, *Bright* favors the Defendants in the present case, and not the United States. One of the most important problems with the case is that it fails or refuses to follow *Carrington v. Rash, supra,* and makes no effort to distinguish the facts or explain the reasons why *Carrington* should not be followed.

Worden v. Mercer County Board of Elections, 294 A.2d 233 (N.J. Sup. 1972) is clearly distinguishable on the facts. One election official testified that he could recall no instance where he permitted registration by a student whose parents lived outside New Jersey. Students were given written notices which flatly stated that "Students registering at Trenton State College cannot register to vote in Ewing Township". These facts are entirely different from the case at hand.

Jolicoeur v. Mihaly, 488 P.2d 1 (Cal. Sup. 1971) dealt with an irrebuttable presumption of residence not based in fact. We are here concerned with determining the true residence of applicants for voter registration.

In *Shivelhood v. Davis,* 336 F.Supp. 1111 (D. Vt. 1971), the opinion accompanied a preliminary injunction

and the court pointed out that "any decision as to the propriety of a preliminary injunction does not reflect our opinion on the merits of final relief". 336 F.Supp. at 1113. The court also recognized that domicile is larely a question of fact and it would be improper for the court to review the applications of each class member and decide who was entitled to vote. The applicable state statute required that the registration authority determine whether an individual "is domiciled [in the political subdivision] as his permanent dwelling place, with the intention of remaining there indefinitely, or returning there if absent from it." The registration authority interpreted this as requiring applicants to intend to remain permanently. The court decided that this was error because "permanently" and "indefinitely" are not synonymous. Thus, the case is already distinguished from the one at bar because the Texas statutes define residence in a different, although similar, fashion. Moreover, Symm does not require the intent to remain permanently as an element of residence. The Waller County Defendants are carefully following the Texas statutory definition of residence while the registration authority in *Shivelhood* was misinterpreting the applicable statutory definition.

Furthermore, the applicable Vermont statute provided that the written application under oath constituted prima facie evidence of residence and the registration authority was required to place on the voter checklist any person who filed such statement unless the authority had sufficient evidence to rebut the statement. No similar presumption or prima facie case of residence is found in the Texas Election Code.

The opinion went on to hold that students could not be required to fill-out a supplemental questionnaire un-

less all applicants were required to complete the same questionnaire. This coincides with the Waller County procedure of sending the questionnaire to any applicant who has not supplied initial indicia of residence, which procedure was expressly approved in *Ballas v. Symm, supra.*

The opinion in *Shivelhood* continues:

> "We stress, however, that the examples we have listed do not provide an exhaustive list and that we have stated only those factors that the Board may not consider conclusive and have not attempted to indicate those factors which we think would justify a Board of Civil Authority in determining that an applicant was not domiciled in a given town." 336 F.Supp. at 1115.

In contrast, the lower court here has legislated exactly what guidelines and information may be accepted as indicating the residence of an applicant.

The Cause Of Action In This Case Is The Same As Ballas And Wilson

The doctrine of *res judicata* should bar this suit and it is the primary focal point of this section. But even if we assume it does not apply, the doctrine of *stare decisis* cannot be avoided.

The plaintiffs in *Wilson* alleged causes of action under the 14th and 26th Amendments (as does the United States in this case), and under 42 U.S.C. § 1983. Each of the individual plaintiffs in *Wilson* was black and each was a student at Prairie View A & M. Among other things, they claimed that students were singled out for more onerous treatment in determining their residency

and asked that the questionnaire procedure used by Symm be declared unconstitutional and void. (The identical claim and request are made by the United States.) The objectionable questionnaire was attached to the complaint as Exhibit A. It is identical to the questionnaire involved in the present case. It is also important to note that Bob Bullock, then Secretary of State of the State of Texas, was a Defendant in *Wilson*. The present Secretary of State was a Defendant here. The *Wilson* Court held that the argument predicated on the 26th Amendment must fail because the plaintiffs were denied registration on the ground of nonresidency and not on account of age. This holding was predicated on a factual finding that Defendant Symm declined to register plaintiffs after reaching a good-faith determination that plaintiffs were not residents of Waller County. This good-faith determination was based on the same questionnaire and procedures that are challenged in the present suit. It is also interesting to note that while the racial discrimination claim under 42 U.S.C. § 1971 was abandoned, the Court still expressly found no discrimination on the basis of race and added that "the fact that all plaintiffs are Negros is no more than a fortuitous consequence of the fact that the only aggregation of college students in Waller County happens to be at Prairie View, which for historical reasons, has a predominantly Negro student body. It follows that the statutory and decisional law relating to racial disfranchisement is for the most part irrelevant to this suit." *Id.* at 13. The same is true in the present case.

In *Ballas,* causes of action were alleged under the Fourteenth Amendment, and 42 U.S.C. §§1971(a)(2)(A), 1983 and 1988. (The United States relies on §1971[a]). Ballas, a student at Prairie View like Wilson,

brought the action on behalf of all persons who applied to Symm for voter registration but were subjected to different standards, practices or procedures in determining their eligibility. Once again, the claimed "different standards, practices or procedures" equalled the questionnaire. The District Court refused to certify the suit as a proper class action. 351 F.Supp. at 890. The Court of Appeals, however, found a class from the record before it and defined that class as "those who protest the use of questionnaire per se." 494 F.2d at 1172. The claims of that class were held to be rendered moot because of the Court of Appeals' holding that Symm's "use of the questionnaire to determine residency is not a violation of the Equal Protection Clause or the Voting Rights Act" — yet it is precisely this same class on whose behalf the Government brings this suit! The specific prayer of the complaint here is for a declaration that the use of the questionnaire is unlawful and for an injunction restraining "further use of any such questionnaire as a prerequisite to voter registration in Waller County (Complaint, pp. 4, 5). The plaintiff in Ballas attached the questionnaire as Exhibit 3 to his complaint and prayed for a declaration that the questionnaire was unlawful and for an order for mass registration of the class to whom it had been sent. (*Ballas* Complaint, Paragraphs V, X, Prayer, Exhibit 3). Note also that the questionnaire was attached to the Third Amended Complaint (the trial complaint) in *Wilson* as Exhibit A and, again, there was a prayer that the use of the questionnaire by Symm be declared unlawful and that he be enjoined from using it to determine residency (*Wilson* Third Amended Complaint, p. 4).

In each of the three cases, the same basic right and the same basic wrong are alleged with slight variations in

language and approach. The crux of the matter in each case is Mr. Symm's use of the same questionnaire to determine the residence of voter registration applicants who supply no earlier objective indicia of residence. According to each of the plaintiffs, the questionnaire procedure supposedly equals discrimination on the basis of age and race. The majority of the applicants who are asked to complete a questionnaire are students at Prairie View A & M because they have failed to supply any indication of residence in Waller County. Essentially, each case involves an effort to avoid doing anything other than completing an initial application for voter registration. The effort in each case is by or on behalf of the applicants who have been required to submit more than the initial application.

Mere repetition of the same basic cause of action should not be tolerated, whether it is sought through variation in theory or by pleading new facts. *Weiss v. United States*, 227 F.2d 72 (2nd Cir. 1955), *cert. den.* 350 U.S. 936, 76 S.Ct. 308 (1956); *Jones v. United States*, 228 F.2d 52 (D.C. Cir. 1955); *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, 109 F.2d 623 (5th Cir. 1940), *cert. den.* 310 U.S. 653, 60 S.Ct. 1101 (1940); *Reiter v. Universal Marion Corp.*, 299 F.2d 449 (D.C. Cir. 1962) (second suit characterized Defendant's conduct as continuous course of conduct rather than isolated acts and demanded injunction); *Moreno v. Marbil Productions, Inc.*, 296 F.2d 543 (2nd Cir. 1961) (from contract to tort); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961) (from breach of contract to breach of anti-trust laws); *Anselmo v. Hardin*, 253 F.2d 165 (3rd Cir. 1958) (in second deportation proceeding, from entry without

visa to entry without inspection); *Miller v. National City Bank of New York,* 166 F.2d 723 (3rd Cir. 1948); *Allen v. Johnson,* 70 F.2d 927 (D.C. Cir. 1934), *cert. den.* 293 U.S. 572, 55 S.Ct. 84 (1934); *Williamson v. Columbia Gas & Electric Corp.,* 186 F.2d 464 (3rd Cir. 1950) *cert. den.* 341 U.S. 921, 71 S.Ct. 743 (1951); *Brickel v. Chicago, B. & Q. R. Co.,* 200 F.Supp. 240 (Wy. 1961) (from conversion of ore to gross negligence in failing to maintain standard established by law for protection of plaintiff's property from unreasonable risk of harm; plaintiffs "cannot separate their grounds to reach the same result via a different theory, keeping their second theory in reserve, in a suit subsequent to the first dry run"); *Estevez v. Nabers,* 219 F.2d 321 (5th Cir. 1955); *Lester v. NBC,* 217 F.2d 399 (9th Cir. 1955), *cert. den.,* 348 U.S. 954, 75 S.Ct. 444 (1955); *Koblitz v. Baltimore & Ohio R. Co.,* 164 F.Supp. 367 (S.D. NY. 1958). It is clear from the foregoing cases that variation in form rather than in substantive grounds does not create a new cause of action for res judicata purposes.

A related principle under the federal law of res judicata is that a party must raise all claims that are a part of the cause of action under adjudication. A final judgment on the merits constitutes an absolute bar to a subsequent action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. "Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever." *Cromwell v. County of Sac,* 94 U.S. 195, 198 (1876). *Accord, Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 597, 68 S.Ct.

715, 719 (1948); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 378, 60 S.Ct. 317, 320 (1940); *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 321, 47 S.Ct. 600, 602 (1927); *Aerojet-General Corporation v. Askew,* 511 F.2d 710 (5th Cir.) *appeal dismissed,* 423 U.S. 908 (1975).

Various tests have been suggested for determination of what constitutes a cause of action for purposes of res judicata.

(1) Whether the same right is infringed by the same wrong. *Baltimore S.S. Co. v. Phillips, supra,* 47 S.Ct. 600.

(2) Whether "there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights or interests established by the first" judgment. *Moreno v. Marbil Productions, Inc., supra,* 296 F.2d at 545.

(3) Identity of grounds. *Wilson Cypress Co. v. Atlantic Coast Line R. Co., supra,* 109 F.2d at 627 ("not identity of form, but of grounds").

(4) Whether the same evidence would suffice to sustain both judgments. *United States v. Haytian Republic,* 154 U.S. 118, 14 S.Ct. 992 (1894); *Kelliher v. Stone & Webster,* 75 F.2d 331 (5th Cir. 1935).

Aerojet-General Corporation v. Askew, supra, is a recent case which combines the tests.

Under any of the approved tests, this suit is barred. The same right (equal treatment of applicants for voter

registration) is supposedly infringed by the same wrong (more stringent procedure, i.e., questionnaire). *Wilson* and *Ballas* held that Mr. Symm had the right to use the questionnaire for the purpose of determining residency, thereby promoting the integrity of the election process. It is obvious that the judgment in this case impairs his right to use the questionnaire and thereby jeopardizes the integrity of the electoral process in Waller County. The grounds asserted in this case (questionnaire and registration procedures = discrimination on account of age and race) are virtually identical to *Ballas* and *Wilson*. Even the form of the claims are the same (14th and 26th Amendments, 42 U.S.C. 1971). Finally, the same evidence would sustain all three judgments. As Mr. Symm's affidavits show, the procedures and the form of the questionnaire have been the same since 1971. Those identical procedures and questionnaire have twice before been held valid. Superficial distinctions between the three cases should not be upheld.

The Real Parties In Each Of The Three Cases Are Identical

The United States contends it is not bound by *Ballas* and *Wilson* because it was not a party to either suit. But under the Federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interest as to be his virtual representative. In *Chicago R.I. & P. Co. v. Schendel,* 270 U.S. 611, 46 S.Ct. 420 (1926), the Supreme Court approved the foregoing principle with a quotation from an earlier Court of Appeals decision as follows:

"And, conversely, in United States v. Des Moines Valley R. Co., 84 F. 40, 28 C.C.A. 267, where a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication by a state court in a suit against him personally, determining the same issues, was available as an estoppel against the government. The ground of the decision was thus stated (pages 44, 45 (28 C.C.A. 272)):

'Inasmuch, then, as the government sues for the sole benefit of Fairchild, and for the professed purpose of reinvesting him with a title which he has lost, we are of opinion that, whether the present action be regarded as brought under the Act of March 3, 1887 (24 Stat. 556, c. 376 (Comp. St. Sec. 4895 et seq.)), or as brought in pursuance of its general right to sue, *the government should be held estopped by the previous adjudication against the real party in interest in the state court.* The subject-matter and the issue to be tried being the same in this proceeding as in the former actions, *the losing party on the former trials ought not to be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of the former adjudications.* Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co., 12 U.S. App. 320, 325, 55 F. 690, 5 C.C.A. 249. This doctrine was applied by this court in the case of Union Pac. Ry. Co. v. U. S., 32 U.S. App. 311, 319, 67 F. 975, 15 C.C.A. 123, which was a suit brought by the United States under the Act of March 3, 1887, wherein we held that the United States was bound by an estoppel which might have been invoked against the real party in interest if the suit had been brought in his name, because it appeared that the United States had no substantial interest in the controversy, and was merely a nominal plaintiff." 270 U.S. at 619, 46 S.Ct. at 423.

The *Schendel* case arose from an accident on the line of the railway company in Iowa. The employer instituted proceedings under the Iowa Workmen's Compensation law and the Court held that the action was barred by res judicata because of a prior final judgment rendered in the Iowa courts determining that the employee was killed in intrastate commerce. The prior action was brought by the administrator of the deceased employee for the benefit of the surviving widow. Thus, the real party in both cases was the same (the surviving widow). In the present case, the real parties are those applicants for voter registration who are asked to complete the questionnaire, which group is comprised predominantly of students from Prairie View A & M. In *Ballas* and *Wilson*, the same real parties were involved.

Conversely, in *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424 (1912), the Court held that the United States had the capacity to maintain a suit to set aside conveyances made by Indian allottees of allotted lands and that the allottees need not be joined. The defendant in that case insisted that, unless the allottees who had executed the conveyances were brought in as parties, he was in danger of being subjected to a second suit by the allottees. Answering that contention, the Court said:

> "But if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. (Citing cases) And it could not, consistently with any principle be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to

> cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question." 32 S.Ct. at 434-35.

Ballas and *Wilson* should preclude or control this case.

The Pendent Cross-Claims

The United States sued the State of Texas, the Secretary of State of Texas, and the Attorney General of Texas, in addition to the Waller County Defendants, claiming they had the authority under the Texas Election Code to stop the registration practices complained of. The Secretary of State of Texas originally answered this claim in the following language:

> "This Defendant would show that although the Secretary of State is statutorily designated as the chief elections officer of the State of Texas, that each individual tax assessor-collector of each county of the State of Texas is statutorily empowered and required to administer the voter registration laws of the State of Texas and operates autonomously and independently of the Secretary of State in administering such laws. Each assessor-collector is the administrative authority to determine residency of any applicant for registration, and *the Secretary of State is not permitted by law to substitute his judgment for that of the county assessor-collector.*" (emphasis added)

The answer of the State of Texas and the Attorney General contains almost identical language.

On September 1, 1977, the Secretary of State of Texas changed his position and adopted Emergency Rule

004.30.05.313, which provides "No questionnaire or additional written information shall be required prior to the registration of any applicant for voter registration who has properly completed a voter registration form which has been prescribed by the Secretary of State". Simultaneously, the Secretary of State directed Symm "to discontinue any voter registration procedure which requires an applicant to provide any written information not required by Article 5.13b, Subdivision 1, Vernon's Texas Election Code".

The foregoing emergency rule and directive form the basis of the cross-claims between the State and Symm. The District Court held in favor of the State and enforced the directive by its injunction.

The Texas Election Code, articles 1.03, 5.01, 5.02, 5.08, 5.09a, 5.10a, 5.17a, 5.18a, and *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. Sup. 1972) make it clear that the judgmental residency determination is left to the individual tax assessor-collectors under Texas law, and the Secretary of State cannot, and does not, have the unconstitutional power to abrogate legislative enactments. Additional argument and authorities pertaining to the pendent cross-claims will be presented in a brief on the merits if permitted by the Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and of general public importance. It is submitted that this Court should grant plenary consideration, with briefs on the merits and oral argument, and reverse the judgment below and render judg-

ment that the appellees take nothing by their respective claims and cross-claims.

Respectfully submitted,

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